evidence to this effect was given by him. On the contrary, in cross-examining the first appellant, counsel for the third appellant suggested that that was not true. Secondly, the evidence that Teoh had asked the first appellant to inform the third appellant that the latter was to keep the plastic bag for Ah Sam is hearsay and is not evidence of the truth of the content of that statement. This evidence was not accepted by the learned trial judges and we can see no reason for treating it otherwise.

We now turn to the last complaint made by counsel for the third appellant. It was submitted that the prosecution had Ah Ho as a material witness but failed to call him to give evidence, and in consequence there was a gap in the prosecution evidence adduced against the third appellant. The learned trial judges, so counsel submitted, found that the first appellant came down from Penang to carry out the delivery of the heroin and that his meeting with the third appellant and Ah Ho was directed to that end, and that the third appellant 'was part of the chain of delivery of the heroin'. There was no evidence to support such finding; Ah Ho was not called as a witness. There is therefore a gap in the prosecution's case and it is the duty of the prosecution to close this gap. We rejected this argument. There was no gap in the case against the third appellant. He was found to have in the boot of his car the quantity of heroin, in respect of which he was charged and he was driving that car from Race Course Road to the junction of Braddell Road and Lorong Chuan where he was arrested. Applying the statutory presumptions, there was a prima facie case of trafficking in the quantity of heroin and he had not rebutted this case. His evidence was not accepted by the learned trial judges and, in our view, rightly. Accordingly, we dismissed the appeal.

Appeal dismissed.

Solicitors: *Sant Singh & Partners; JB Jeyaretnam & Co; Peter Pang & Co.*

Reported by *Mathavan Devadas*

Arab Banking Corp v United Overseas Bank Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 111 OF 1988
YONG PUNG HOW CJ, THEAN AND CHAO HICK TIN JJ
28 MARCH 1991

Land Law — Mortgages and charging orders — Mortgaged property sold under statutory power of sale — Whether mortgagee obliged to hold surplus moneys from the sale on trust for a subsequent incumbrancer — Whether appellants were subsequent incumbrancer of the property as their charging order absolute was not registered against the property with the Registry of Deeds — Conveyancing and Law of Property Act (Cap 61, 1985 Ed), s 26(3) — Registration of Deeds Act (Cap 269, 1989 Ed), ss 2 & 4 — Rules of the Supreme Court 1970, O 50 r 1

Bankruptcy — Creditor's rights under execution — Execution creditor having no notice of act of bankruptcy or of bankruptcy proceedings against debtor — Statutory power of sale of mortgaged property — Sale completed and proceeds received by mortgagees before debtor adjudicated bankrupt — Whether creditor's claim to surplus sum from sale affected by bankruptcy of debtor — Bankruptcy Act (Cap 20, 1985 Ed), s 49

Banking — Set-off — Sums due and payable to respondents under guarantee — Mortgaged property sold by respondents — Surplus from sale — Whether respondents entitled to set-off debt against surplus

The property in question was beneficially owned by the debtor although the legal estate thereof was vested in another person called Sim. Sim executed two mortgages dated 6 July 1983 and 7 June 1984 respectively in favour of the respondents to secure his account with the respondents. Between the dates of these two mortgages, the debtor executed two guarantees: one dated 2 March 1984 in favour of the appellant and the other dated 16 March 1984 in favour of the respondents, both guarantees were to secure the due payment of all moneys and liabilities owing from a company called City Securities (Pte) (now in liquidation) ('City Securities'). City Securities became insolvent and the appellants instituted legal proceedings against the debtor for recovery of the moneys owed by City Securities to the appellants. Judgment was entered and pursuant thereto the appellants instituted execution proceedings against the debtor and obtained a charging order nisi on the property on 7 August 1986 which charging order was registered against the property with the Registry of Deeds on 12 August 1986. On 3 October 1986 the appellants obtained a charging order absolute and appointed a receiver on 10 October 1986 to enforce the charge.

On 21 October 1986 the respondents exercised their power of sale over the property and completed the sale on 22 January 1987. The proceeds were applied by the respondents in settlement of the amount due to them under the mortgages and costs and other expenses incurred and there remained a surplus. On 27 January 1987 the debtor committed an act of bankruptcy and on 29 January 1988 a receiving order and an adjudication order were made against the debtor. It appeared that neither the appellants nor the respondents had any notice of the debtor's act of bankruptcy or the bankruptcy proceedings taken against him at any time up to the date when the receiving and adjudication orders were made against him.

The appellants claimed the surplus moneys on the ground that they held a charge on the property and that under s 26(3)

of the Conveyancing and Law of Property Act (Cap 61, 1985 Ed) the respondents were constituted trustee of this amount and were obliged to pay it to the appellants as the subsequent incumbrancer. The respondents rejected this on the grounds that (i) the process of obtaining the charging order is a form of execution of the judgment against the debtor and that the appellants had not completed execution at the date when the receiving order and the adjudication order were made against the debtor and (ii) the respondents were entitled to set off against the amount the sum due and payable to them by the debtor under the guarantee dated 16 March 1984. The appellants' claim was dismissed by Lai Kew Chai J.

Held, allowing the appeal:

(1) The provisions of s 26 (3) of the Conveyancing and Law of Property Act are tolerably clear and there was no dispute that the respondents were obliged under that subsection to hold the surplus moneys in trust for the next incumbrancer of the property.

(2) The appellants were the next incumbrancer of the property in that the charging order nisi and order absolute each imposed a charge on the property. However the charging order absolute had to be disregarded in considering the question whether the appellants had a charge on the property in so far as it was not admissible as evidence of title of the charge on the property since it was not registered against the property with the Registry of Deeds. But it was admissible for the purpose of O 50 r 1 as evidence of a further order made by a court and it made absolute the charge imposed by the charging order nisi. In any case, the charging order nisi which was registered against the property with the Registry of Deeds imposed an immediate charge on the property and the appellants were thereby an incumbrancer of the property. Hence the respondents had an obligation under s 26(3) of the Conveyancing and Law of Property Act to hold the surplus proceeds of sale in trust for the appellants.

(3) At the date of the completion of the sale, there was no question of s 49 of the Bankruptcy Act being applicable. The appellants as execution creditor had no notice of the act of bankruptcy committed by the debtor or of the bankruptcy proceedings taken against him right up to the stage when he was adjudicated a bankrupt and the sale of the property was completed and the whole of the proceeds of sale was received by the respondents long before that time. In fact the sale was completed even before the debtor committed the act of bankruptcy.

(4) In any event s 49 of the Bankruptcy Act had no relevance to the case since the Official Assignee was not a party to the proceedings.

(5) No question of set-off arose in view of the finding that the respondents at the date of completion became obliged to hold the surplus amount in trust for the appellants as the surplus amount then did not belong to the debtor.

Cases referred to

1 *Re Thomson's Mortgage Trusts; Thomson* v *Bruty* [1920] 1 Ch 508 (folld)
2 *Mathews* v *Marsden Building Society*[1951] 1 Ch 758 (distd)
3 *Young* v *Clarey*[1948] 1 Ch 191 (distd)
4 *The Official Assignee of the Property of Lim Chiak Kim, A Bankrupt* v *United Overseas Bank Ltd* [1988] 3 MLJ 189 (folld)
5 *Roberts Petroleum Ltd* v *Bernard Kenny Ltd* [1983] 2 AC 192 (folld)
6 *Haly* v *Barry* (1868) 3 Ch App 452 (folld)
7 *Brereton* v *Edwards* (1888) 21 QBD 488 (folld)

Legislation referred to

Conveyancing and Law of Property Act (Cap 61, 1985 Ed) s 26(3)
Registration of Deeds Act (Cap 269, 1989 Ed) ss 2, 4
Rules of the Supreme Court 1970 O 50 r 1

Appeal from: Originating Summons No 720 of 1988 (High Court, Singapore)

Sarbjit Singh for the appellants.
Woo Bih Li (*Claire Wong* (*Miss*) with him) for the respondents.

Cur Adv Vult

Thean J (delivering the judgment of the court): This is an appeal against the decision of Lai Kew Chai J in which he dismissed the claim of the appellants against the respondents for the sum of $845,285.13 representing the balance of the proceeds of sale of several plots of land marked on the Government Resurvey Map as lots 749, 753, 755 and 756 of Town Subdivision 25 and situate at Nassim Road. We shall refer to these plots of land collectively as 'the property'.

The relevant facts giving rise to the appeal are briefly these. The property at all material times, prior to the sale, was beneficially owned by one Sng Hock Seng ('Sng'); the legal estate thereof was vested in another person, Sim Lek Tee ('Sim'), who, by a deed of trust dated 7 July 1981, declared that he held the property in trust for Sng, the latter having paid the entire consideration for the purchase of the property. By two indentures of mortgage dated 6 July 1983 and 7 June 1984 respectively, the property was mortgaged to the respondents to secure the account of Sim with the respondents and the payment of all moneys owing from Sim from time to time to the respondents, in aggregate, up to the limit of $1,200,000. We shall refer to these two indentures jointly as 'the mortgages'. Though Sim was a bare trustee of the property, the mortgages were expressed to secure his indebtedness and other liabilities to the respondents, and it is not clear from the terms of the mortgages whether they were executed by Sim at the request and for the benefit of Sng. However, nothing turns on this and no question arises as to the propriety or validity of the mortgages.

Between the dates of these two mortgages, Sng executed two guarantees: one guarantee dated 2 March 1984 in favour of the appellants and the other guarantee dated 16 March 1984 (which he executed together with four others) in favour of the respondents, and both guarantees were expressed to guarantee the due payment of all moneys and liabilities owing from a company called City Securities (Pte), now in liquidation ('City Securities'). In 1986 or thereabout, City Securities became insolvent, and as of 2 July 1986, the amount due and owing from City Securities to the appellants was US$2,922,040.64. The appellants instituted legal

proceedings against Sng and four others, who had each executed similar separate guarantees to the appellants, for recovery of this amount in Suit No 4032 of 1986; judgment was entered against them on 31 July 1986. Following that, the appellants instituted execution proceedings against Sng and obtained a charging order nisi on the property on 7 August 1986. The charging order nisi was registered against the property with the Registry of Deeds on 12 August 1986. About three months later, the appellants on 3 October 1986 obtained a charging order absolute and on 10 October 1986 an order for appointment of a receiver to enforce the charge. Both these orders, however, were not registered against the property with the Registry of Deeds.

In October 1986 or thereabout, Sim was in default of payment of moneys due to the respondents under the mortgages, and on 21 October 1986, the respondents in exercise of the statutory power of sale entered into an agreement for the sale of the property at the price of $1,600,000, and the sale was completed on 22 January 1987. The proceeds of sale were applied by the respondents in settlement of the amount due under the mortgages and costs and other expenses incurred, and there remained a surplus of $845,285.13. It is this amount that forms the subject matter of dispute between the appellants and the respondents, which we will discuss in a moment.

On 27 January 1987, Sng committed an act of bankruptcy, in that he failed to comply with the requirements of a bankruptcy notice taken out against him by Hill Samuel Merchant Bank Asia Ltd. However, the receiving order and the adjudication order were not made against him until about one year later, on 29 January 1988. It is not clear whether the appellants had, at any time, any notice of the act of bankruptcy committed by Sng; there was no evidence to show that they had. It certainly appears from the correspondence in exchange between the respective solicitors for the appellants and respondents that neither of them had any notice of Sng's act of bankruptcy or the bankruptcy proceedings taken against Sng at any time up to the date when the receiving and adjudication orders were made against him.

We now come to the dispute between the appellants and the respondents. The appellants claimed the surplus amount of $845,285.13 on the ground that they held a charge on the property, the charge being created by the charging orders, and that under s 26(3) of the Conveyancing and Law of Property Act (Cap 61 1985 Ed), the respondents were constituted a trustee of this amount and were obliged to pay it to the appellants as the subsequent incumbrancer. The respondents rejected this claim. They maintained that the process of obtaining the charging orders is a form of execution of the judgment against Sng and that the appellants had not completed execution at the date when the receiving order and the adjudication order were made against Sng. The respondents further maintained that they were entitled to set off against this amount the sum due and payable to them by Sng under the guarantee dated 16 March 1984.

The appellants therefore brought proceedings by way of Originating Summons No 720 of 1988 against the respondents claiming the sum of $845,285.13. The claim was resisted. It was heard before Lai Kew Chai J who dismissed it, holding that the appellants had not completed execution of the judgment against Sng within the meaning of s 49 of the Bankruptcy Act (Cap 20, 1985 Ed) and, in the alternative, the respondents had a right to set off against this amount the sum due to them from Sng under the guarantee. He said:

> Learned counsel for the defendants made two submissions. First, he submitted that the plaintiffs have not completed their execution within the meaning of s 49(1) and (2)(c) of the Bankruptcy Act (Cap 20) as construed by the Court of Appeal in *The Official Assignee of the Property of Lim Chiak Kim* v *United Overseas Bank Ltd* [1988] 3 MLJ 189. Secondly and, alternatively, it was canvassed on behalf of the defendants that they had a right to set-off against the balance of the proceeds of a sale which was otherwise due to Sng Hock Seng. He observed that if Sng Hock Seng had claimed the surplus the defendants' legal set-off would have been a complete answer. I entirely accepted these submissions.

It is this part of the judgment, against which the whole of the appeal has been directed. Principally, three issues have been raised:

(i) whether the appellants are entitled to be paid the surplus amount of $845,285.13 under s 26(3) of the Conveyancing and Law of Property Act;
(ii) if they are so entitled, whether their entitlement is affected by s 49 of the Bankruptcy Act and
(iii) whether the respondents have a right of set-off as held by the learned judge.

We turn to the first issue. The respondents as a mortgagee had exercised the power of sale and received the proceeds of sale. They were obliged under s 26(3) of the Conveyancing And Law of Property Act to hold the proceeds in trust to be applied in the manner as therein provided. Section 26(3) is in the following terms:

> The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject (if any) or after payment into court under this Act of a sum to meet any prior incumbrances, shall be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses, properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest and costs, and other money (if any) due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

The provision of this subsection is in pari materia with s 105 of the Law of Property Act 1925 of England, which is as follows:

> The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

It has been held that where there is a subsequent incumbrancer the selling mortgagee is obliged under that section to pay the surplus proceeds (ie the balance, after payment of the amount due under the mortgage and the costs and expenses incurred) to that incumbrancer and not to the mortgagor: *Re Thomson's Mortgage Trusts; Thomson* v *Bruty*.[1] In that case, there were four mortgages created over a farm. The second mortgagee, with the privity of the mortgagor, sub-mortgaged the principal sum and the second mortgage to a sub-mortgagee. Subsequently, the first mortgagee sold the farm under the statutory power of sale, and after payment of the principal, interest and costs due under the first mortgage there remained a surplus, and the question arose as to the payment of that surplus. It was held that the first mortgagee was under an obligation under s 21(3) of the Conveyancing and Law of Property Act 1881 (which section in in pari materia with s 26(3) of our Act) to pay the surplus to the sub-mortgagee. Eve J said, at p 667:

> I think he [the first mortgagee] is, and always has been since his claims as first mortgagee were satisfied under a statutory obligation to pay the surplus to the plaintiff Wood as the person then entitled to the mortgaged property and authorized to give a receipt for the proceeds of sale thereof: see Conveyancing & Law of Property Act 1881, s 21, subs (3) and s 22. Bruty [the first mortgagee] had not, in my opinion, any right as a satisfied prior incumbrancer to retain the surplus proceeds as against Wood, and in retaining them he has really been asserting on behalf of the mortgagor and those claiming under him by title subsequent to the plaintiffs to have paid to them the whole surplus after deducting principal and six years of interest only.

Counsel for the respondents on the other hand relied on *Mathews* v *Marsden Building Society*[2] and *Young* v *Clarey*.[3] In both these cases, *Re Thomson's Mortgage Trust*[1] was distinguished and was not applied. However, both these two cases were decided on wholly different issues and are of no assistance to us. In *Mathews*,[2] the first mortgagee of the property in question was a building society and the second mortgagee was a registered moneylender. The mortgagor died and at the date of his death owed sums of money to both of them respectively, and no payment was made to them. Some nine years later, the first mortgagee in exercise of the statutory power sold the property and after satisfying the principal, interest and costs due under the mortgage, had surplus in its hands. The second mortgagee then claimed that surplus. However, under s 13 (1) of the Moneylenders Act 1927 no proceedings by a moneylender for recovery of a loan or for enforcement of a security could be brought, unless the proceedings were instituted within 12 months from the accrual of the cause of action. It was held that by virtue of that provision the claim of the second mortgagee was statute-barred in the sense that it could not bring any action to enforce it and could not be properly described as the person entitled to the mortgaged property or authorized to give a receipt for the surplus proceeds of sale. Clearly, this case is distinguishable from *Re Thomson's Mortgage Trust*.[1] The claim of the moneylender, the second mortgagee, was statute-barred and it could not assert any claim to recover the surplus proceeds. Jenkins LJ in the course of his judgment said, at p 766:

> The prohibition, so far as relevant, imposed by s 13, subs 1, of the Act of 1927, extends to any proceedings for enforcement of any security given in respect of any loan made by the moneylender. Those are very wide words, and in my judgment, as Harman J held, the claim of the plaintiffs, having regard to the substance of the case, was nothing more or less than a claim to enforce the security which they took in respect of the P40 loan, namely, the second mortgage.

Later, with reference to the claim of the second mortgagee, he said, at pp 766-767:

> I think that any proceedings should be regarded as proceedings for the enforcement of a security within the meaning of s 13, if they assert a right to payment of the amount secured, or to payment of the fund subject to the security, and the right is one which can only be asserted by setting up a title under the mortgage. It is plain in this case that in order to have a locus standi in the matter — in order to claim to be beneficiaries under the statutory trusts at all — the plaintiffs had perforce to found their proceedings upon the assertion that by virtue of their second mortgage they were now entitled to this balance. That, in my judgment, is enough to make the present proceedings amount, within the meaning of s 13 of the Act of 1927, to proceedings to enforce the security.

In *Young* v *Clarey*[3] it was held that the first mortgagee, who had been in possession of the mortgaged property for well over 12 years without receiving any payment in respect of principal or interest and without acknowledging the title of the mortgagor and who subsequently sold the property, was entitled to retain the surplus proceeds after payment of the principal, interest and costs due under the mortgage, as the rights of the mortgagor and the subsequent mortgagees were extinguished by the Limitation Act 1939. Again, this case is distinguishable from *Re Thomson's Mortgage Trust*.[1] It is clear that the claim of the second mortgagee being statute-barred, it was not entitled to receive the surplus proceeds of sale

in the hands of the first mortgagee. Harman J made this point very clear in his judgment at pp 196-197:

> Mr Lionel Edwards also pressed me with the decision of Eve J in *In re Thomson's Mortgage Trusts*; *Thomson* v *Bruty*, where he held that the second mortgagee was entitled to be repaid in full out of certain surplus moneys, notwithstanding that his claim to arrears of interest was barred by the Limitation Act of James I. The comment I have to make on that case is to be found in the judgment where Eve J says this: 'No question under the Statue of Limitations 'arises'.' The transaction had been by way of sale by the first mortgage before any title by limitation arose, and therefore, of course, he was bound to deal with the proceeds on the footing that he had to account for them to the puisne incumbrancers, and the fact that one of them could not have sued for the arrears of his interest was held by his Lordship to make no difference.

He later said:

> In my judgment the answer to this summons depends on who is the person entitled to the mortgaged property, and, whoever else may be, I cannot see how the plaintiff can possibly say that it is he, because under ss 12 and 16 of the Limitation Act 1939, all his title has been extinguished and he has no interest in the property.

The provisions of s 26(3) of the Conveyancing and Law of Property Act are tolerably clear, and there is really no dispute that the respondents are obliged under that subsection to hold the surplus amount of $845,285.13 in trust for the next incumbrancer of the property. The question is whether the appellants are the next incumbrancer. It was contended by counsel for the appellants that the charging order nisi and the charging order absolute operated as an immediate charge on the property; that the charge ranked next after the mortgages, and that the appellants were therefore an incumbrancer of the property. In support, he relied on the decision of this court in *The Official Assignee of the Property of Lim Chiak Kim, A Bankrupt* v *United Overseas Bank Ltd.*[4] In that case, the bank obtained a charging order nisi and charging order absolute against the property of the judgment debtor. However, the bank did not proceed further. The property was at that time subject to a mortgage. The mortgagee of that property then sold the property; but before the sale was completed the judgment debtor committed an act of bankruptcy and notice of the act of bankruptcy was given to the bank. Subsequently, the judgment debtor was adjudicated a bankrupt, and a few days later the mortgagee completed the sale and received the entire proceeds of sale. After satisfying the principal, interest and costs due under the mortgage there remained in the hands of the mortgagee a surplus amount which was then paid to the official assignee. The bank unsuccessfully claimed this amount. One of the questions raised before this court was whether the charging order constituted a charge on the property of the judgment debtor. It was held by the court that it did. The court, after referring to the speech of Lord Brightman in *Roberts Petroleum Ltd* v *Bernard Kenny Ltd*[5] at pp 205 and 209, said, at p 193:

> In the instant case, there was imposed on the property a charge created by the order nisi; it was an interim one and was in the words of Lord Brightman 'defeasible'. However, on further consideration under r 1(6) of O 50, that order was replaced by an order absolute imposing a charge on the property, and unlike its predecessor this charge was not defeasible. In our opinion, the order nisi and the order absolute each imposed an immediate charge on the property.

On this authority, counsel for the appellants was plainly right in his submission that in the instant case, the charging order nisi and order absolute each imposed a charge on the property.

However, there is one difficulty in the way of the argument advanced on behalf of the appellants — a difficulty essentially of their own creation which, fortunately, is not insurmountable. The title to the property is derived from a grant and is what is generally called a common law title; it has not been brought under the Land Titles Act — it certainly had not been brought under the Act at the material time. The charging order nisi was registered against the property with the Registry of Deeds soon after it was made. When the charging order was made absolute, no step, however, was taken by the appellants to register the order absolute.

Under s 4 of the Registration of Deeds Act (Cap 269, 1989 Ed), no assurance of property is admissible in any court as evidence of title to the property unless it is registered. Section 4 provides:

> Subject to this Act and the rules, all assurances executed or made, and all probates and letters of administration granted, before or after 30 November 1988 by which any land within Singapore is affected and which have not been registered under any repealed enactment, may be registered in such manner as is hereinafter directed, and unless so registered shall not be admissible in any court as evidence of title to such land.

Under s 2 of the Act an assurance includes an order of court and an order of court includes, inter alia, an order whereby any interest in any land is or may be affected. The relevant provisions of s 2 are as follows:

> 'assurance' includes any conveyance, memorandum of charge or discharge, deed of consent to the discharge of a trustee, private Act, order of court or certificate of appointment of trustee in bankruptcy.
>
> 'order of court' means any judgment, decree, writ of execution or sequestration, adjudication in bankruptcy or other order or process of or issuing from that court or other court of competent jurisdiction whereby any interest in any land is or may be affected.

A charging order is by its express terms an order whereby interest in the land comprised therein is affected and is an assurance falling within the meaning of s 2 of the Act. It was therefore argued by counsel for the respon-

dents, and we agree with him, that s 4 of the Act applies and as the charging order absolute has not been registered against the property with the Registry of Deeds it is not admissible as evidence of title of the charge on the property. It therefore follows that in considering the question whether the appellants had a charge on the property, the charging order absolute must be disregarded. It was further submitted by counsel for the respondents that the charging order nisi had lapsed and was replaced by the charging order absolute, and as the charging order absolute is not admissible in this court as evidence of title of the charge on the property, the appellants did not have a charge on the property. We are unable to accept this further argument. First, if the charging order absolute is inadmissible as evidence of the appellants' charge on the property, equally it is inadmissible as evidence that the charging order nisi 'had lapsed' and 'was replaced' by the charging order absolute. Secondly, if the charging order absolute is not admissible only for the purpose of the Registration of Deeds Act as evidence of title of the charge on the property, but it is admissible for the purpose of O 50 r 1 as evidence of a further order made by court, then a perusal of this further order shows that it confirmed and made absolute the charge imposed by the charging order nisi. The charging order absolute certainly does not say that the charging order nisi 'has lapsed' or 'has been replaced' by the charging order absolute.

In advancing this argument, counsel was obviously relying on the following passage of the judgment of this court in *Lim Chiak Kim*[4] at p 193: 'on further consideration under O 50 r 1(6) [the order nisi] was replaced by an order absolute imposing a charge on the property, and unlike its predecessor this charge was not defeasible.' The words 'was replaced' were not used in the sense that the order nisi had lapsed or was destroyed or extinguished by the order absolute but in the sense that it was merged with the order absolute: the latter order made absolute what was nisi and the charging order was no longer defeasible. That was the sense intended. That is also the meaning intended by O 50 r 1 which, so far as relevant, provides:

> 1 (1) The power to make an order under paragraph 4 of the First Schedule to the Act imposing a charge on immovable property or interest in immovable property of a judgment debtor shall be exercisable by the Court in Form 102.
>
> (2) Any such order shall in the first instant be an order to show cause, in Form 103 specifying the time and place for further consideration of the matter and imposing the charge until that time in any event.
>
> ...
>
> (6) On the further consideration of the matter the Court shall, unless it appears (whether on the representation of the judgment debtor or otherwise) that there is sufficient cause to the contrary, make the order absolute with or without modifications.
>
> (7) Where on the further consideration of the matter it appears to the Court that the order should not be made absolute. it shall discharge the order.

In effect, under the provisions of r 1, there is but one order; first, it is to be in a nisi form, ie to show cause, and subsequently, on further consideration, it is to be made absolute, unless sufficient cause to the contrary is shown, and it follows that when it is made absolute it relates back to the order nisi. This view is consistent with authorities. In *Haly* v *Barry*[6] a judgment creditor took out a writ of fi fa against the judgment debtor, Barry, seeking to attach his chattels. The attachment was subsequently withdrawn, as one creditor, Haly, claimed that the chattels had been sold to him. Barry then died, and his widow proved his will of which she was appointed executrix. Following that, the judgment creditor applied for an order charging 1,600 shares of a company which belonged to Barry. That was an order nisi. The jurisdiction of the court for making the charging order was founded on ss 14 and 15 of the statute 1 and 2 Vict c 110 which, so far as relevant, provided:

> XIV And be it enacted, That if any Person against whom any Judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any Government Stock, Funds, or Annuities, or any Stock or Shares of or in any Public Company in England ... *it shall be lawful for a Judge* of one of the Superior Courts, on the Application of any Judgment Creditor, *to order that such Stock, Funds, Annuities, or Shares*, or such of them or such Part thereof respectively as he shall think fit, *shall stand charged with the Payment of the Amount* for which Judgment ... provided that no Proceedings shall be taken to have the Benefit of such Charge until after the Expiration of Six Calendar Months from the Date of such Order.
>
> XV And ... , be it further enacted, *That every Order of a Judge charging any Government Stock, Funds, or Annuities, or any Stock or Shares in any Public Company, under this Act, shall be made in the first instance ex parte, and without any Notice to the Judgment Debtor, and shall be an Order to show Cause only: ... and further, that, unless the Judgment Debtor shall* within a Time to be mentioned in such Order show to a Judge of one of the said Superior Courts *sufficient Cause to the contrary, the said Order shall, after Proof of Notice thereof to the Judgment* Debtor, his Attorney or Agent, *be made absolute:* ... (Emphasis is added.)

Immediately after that charging order, a decree for administration of Barry's estate was made in the suit instituted by Haly. Haly then applied for an injunction restraining the judgment creditor from further proceeding on the charge. The application was refused by Malins VC and his decision was affirmed on appeal. Page Wood LJ having referred to ss 14 and 15 of the statute 1 and 2 Vict c 110, said at pp 456-457:

> It is obvious that throughout these sections one order only is spoken of, which is at first to be an order nisi and is afterwards to be made absolute. Ought then a creditor to be interfered with who has pursued his remedies with such diligence. He has obtained a charging order, subject only to this, that cause may be shewn against making it abso-

lute. I think that, consistently with the scope and spirit of the Act, we must hold that it is liable to be defeated only by something prior to it, shewing that it ought not to have been made, and not by anything subsequent to it. ... The statute directs the judge to make an order nisi. If sufficient cause is shewn against it, it falls, but if not, it remains in force, and in the meantime it is operative, taking the fund out of the control of the debtor, and the only question remaining is, whether any sufficient cause can be shewn against making it absolute.

Selwyn LJ said, at p 457:

The question turns upon this, whether the charging order is to be considered as one or two. It has been urged that there are two orders, and that the first goes for nothing unless followed by the other. The language of the Act appears to me quite opposed to this view, it speaks of one order which is at first an order nisi, and is afterwards made absolute.

That decision was approved and followed by the Court of Appeal in *Brereton* v *Edwards.*[7] There, the execution creditor obtained a charging order nisi on the money which was standing to the debtor's credit in the name of the Paymaster-General in the Chancery Division. Before the order was made absolute, the plaintiff obtained an order in an administration action of the estate of the debtor for payment out of the same amount. After this order was made, the order nisi was made absolute. Lord Esher MR, after referring to *Haly* v *Barry*,[6] said, at p 496:

That decision seems to me to amount to this, that the order nisi is the charging order, but that it stands in abeyance until it is made absolute. When, however, it is made absolute the order nisi is the charging order, and it takes effect from the date when it was originally made. The result of this is, that the plaintiffs' charging order is prior in date to the order for payment to the guardians.

Lindley LJ put the position more clearly; he said, at pp 497-498:

The next question is whether the charging order has priority over the order for payment to the guardians, and I think it has. From what date does the charging order take effect? *Haly* v *Barry* shews that the effect of the two orders — the order nisi and the subsequent order absolute — was to charge the fund as from the date of the order nisi, and I can see no difference in principle for this purpose between a charging order made under the statutory power, and a similar order made under the general statutory power, and a similar order made under the general jurisdiction of the court. The charging order, when it was made absolute, related back to the date of the order nisi. That order was in effect a charging order made ex parte.

In the instant case, only the charging order nisi was registered against the property with the Registry of Deeds, and it is this order alone we have to consider in determining whether the appellants had a charge on the property at the material time. This question has been decided by this court. In *Lim Chiam Kim*,[4] it was held, inter alia, that a charging order nisi operated as an immediate charge on the property in question. In coming to this decision, the court followed the decision of the House of Lords in *Roberts Petroleum Ltd* v *Bernard Kenny Ltd.*[5] It would be repetitive here to advert in detail to this case and the very helpful passages of the speech of Lord Brightman which have been set out at some length in the judgment in *Lim Chiak Kim.*[4] Suffice it here to say that on these authorities, the charging order nisi in the instant case imposed an immediate charge on the property. True it is that it was defeasible, but it had not been discharged, and the charge imposed remained in force. Accordingly, the appellants at the date of the sale of the property by the respondents had,by virtue of the charging order nisi, a charge on the property; they were an incumbrancer of the property. Upon completion of the sale and conveyance of the property to the purchaser, the equity of redemption was destroyed or extinguished; so also was the charge of the appellants, whose remedy then is only against the proceeds of sale: see 38 *Halsbury's Laws of England* (4th Ed) para 738). Section 26(3) of the Conveyancing and Law of Property Act came into operation and the respondents' obligation under that section immediately arose. They were constituted a trustee of the proceeds of sale and were obliged to apply the same in the manner provided by that subsection. After satisfying all moneys due under the mortgage and the costs and expenses incurred in the sale, they held the surplus proceeds of sale in trust for the next incumbrancer, and the appellants were the next incumbrancer. The respondents were therefore obliged to pay the surplus proceeds to the appellants.

The next question is whether the appellants' entitlement to receive these surplus proceeds is affected by s 49 of the Bankruptcy Act. That section provides:

(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this Act —

(a) an execution against goods or land is completed by seizure and sale, or in the case of an equitable interest in land by the appointment of a receiver;
(b) an attachment of a debt is completed by receipt of the debt;
(c) an attachment of property is completed by the sale of such property and the satisfaction out of the proceeds of the sale of the judgment in execution of which the attachment was made.

It was contended by counsel for the respondents that the process of obtaining a charging order under O 50 r 1 is a form of execution and that the appellants had not completed execution on the date when the receiving

order and the adjudication order were made against Sng. In support, counsel relied once again on *Lim Chiak Kim.*[4] But the crucial difference, on the facts, between *Lim Chiak Kim*[4] and the instant case is this. In *Lim Chiak Kim,*[4] the execution creditor received notice of the act of bankruptcy of the debtor before the completion of the sale of the property in question and its right as execution creditor was affected by the operation of s 49 of the Bankruptcy Act. This is evident from the following passage of the judgment of the court, at p 196:

> In the instant case, the execution initiated by the bank had never reached the stage of sale. After the receivers were appointed and the charging order nisi was made absolute neither the bank nor the receivers took any further step towards realizing the charge. The property was subsequently sold by the mortgagees freed from the charging order absolute of the bank, and the sale was eventually completed on 27 May 1985. Before that, on 16 May 1985, the bank received notice of the act of bankruptcy of Lim and bankruptcy petition had already been presented against Lim. Hence, at that date the bank had not completed execution against the property and was therefore not entitled under s 49(1) to retain the benefit of their execution. In our opinion, although at that time the bank had a charge on the property, owing to the subsequent intervention of Lim's bankruptcy, the bank could no longer rely on that charge and claim to rank as a secured creditor. In other words, the charging order, apart from being an instrument creating a charge on the property, was also a mode of execution, and by the operation of s 49(1) the bank was no longer entitled to retain the benefit of that charge against the Official Assignee.

In that instant case, the appellants as the execution creditor had no notice of the act of bankruptcy committed by Sng or of the bankruptcy proceedings taken against him right up to the stage when he was adjudicated a bankrupt, and the sale of the property was completed and the whole of the proceeds of sale was received by the respondents long before that time. Indeed, the sale was completed even before Sng committed the act of bankruptcy. The sequence of the relevant events is as follows: the sale was completed by the respondents on 22 January 1987; Sng committed an act of bankruptcy on 27 January 1987, of which the appellants had no notice, and the receiving order and the adjudication order against Sng were made on 29 January 1988. Hence, on 22 January 1987 the respondents, having received the entire proceeds of sale and having satisfied the amounts due under the mortgages, held the surplus proceeds in trust for the appellants, and the latter were entitled to payment thereof, and the amount ought to have been paid on or soon after the date. It is true that the charging order nisi, apart from being an instrument creating a charge on the property, was also a mode of execution as was held in *Lim Chiak Kim.*[4] However, at the date of completion of the sale of the property there was no question of s 49 of the Bankruptcy Act being applicable; at that date the appellants' charge on the property was extinguished; their remedy then was only against the proceeds of sale, and s 26(3) of the Conveyancing and Law of Property Act came into operation with the result that the obligation of the respondents thereunder immediately arose and the appellants became entitled to the surplus proceeds. The bankruptcy of Sng took place much later and could not afect the right or entitlement of the appellants to receive the amount.

In any event, s 49 of the Bankruptcy Act has no relevance here. Under that section a creditor cannot retain the benefit of execution or attachement against the official assignee unless he has completed the execution. The Oficial Assignee is not a party to these proceedings, and as between the appellants and the respondents there is nothing in that section or, for that matter, anywhere in the Bankruptcy Act to say that the appellants could not have the benefit of the charging order nisi or to prevent the trust imposed on the respondents under s 26(3) of the Conveyancing and Law of Property Act from arising.

In view of what we have decided, the last issue, namely, whether the respondents were entitled to set of the amount owing by Sng against the surplus proceeds of sale does not arise. The respondents at the date of completion became obliged to hold the surplus amount in trust for the appellants; that amount does not belong to Sng and no question of any such set-off arises.

In the result, this appeal must succeed. We allow the appeal, set aside the order below, and order that the sum of $845,285.13 representing the surplus proceeds of sale be paid to the appellants together with interest at 8% pa from the date of the originating summons to this date. The respondents will have to pay the costs of the appellants here and below, and there will be the usual consequential order for payment to the appellants or their solicitors of the amount deposited as security for costs.

Appeal allowed.

Solicitors: *Lim & Lim; Allen & Gledhill.*

Reported by *Yap Shao Sin*